

## **APPENDIX E**

### **Negotiated Agreements**

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## APPENDIX E

### NEGOTIATED AGREEMENTS

In April 2001, DM&E submitted 51 negotiated agreements to the Surface Transportation Board (Board) addressing environmental issues. DM&E had negotiated these agreements with 51 of 56 communities on DM&E's existing rail line. Consistent with the Board's established precedent encouraging privately negotiated solutions and giving effect to negotiated agreements whenever possible, SEA will not interfere with the terms of the agreements agreed upon by DM&E and the relevant community, through its elected representative(s). Therefore, the site specific mitigation measures listed in Chapter 12 of the Final Environmental Impact Statement (EIS) only apply to those communities and other areas without negotiated agreements.

To ensure implementation of all of the negotiated agreements, SEA recommends that the Board impose an environmental condition requiring that the Applicant, DM&E, comply with the negotiated agreements. Moreover, if other negotiated agreements are executed and submitted to the Board after publication of this Final EIS, SEA recommends that the Board require compliance by imposing an appropriate environmental condition to replace local mitigation that otherwise would be imposed.

The following table (Table E-1) provides the communities with which DM&E has indicated it has executed negotiated agreements and has provided those agreements to the Board.

<b>Table E-1 Negotiated Agreements</b>			
<b>Minnesota</b>			
Balaton	Byron	Claremont	Cobden
Dodge Center	Dover	Eyota	Garvin
Janesville	Kasson	Lake Benton	Lamberton
Lewiston	Minnesota City	New Ulm	Owatonna
Revere	Sanborn	Sleepy Eye	Springfield
Stockton	St. Charles	Tracy	Tyler
Utica	Walnut Grove	Waseca	

<b>Table E-1 Negotiated Agreements</b>			
<b>South Dakota</b>			
Arlington	Aurora	Blunt	Cavour
Cottonwood	Desmet	Elkton	Ft. Pierre
Harrold	Hetland	Highmore	Huron
Iroquois	Lake Preston	Midland	Miller
Phillip	Quinn	Ree Heights	St. Lawrence
Volga	Wall	Wessington	Wolsey

\* \* \* \* \*

OCT 10 2001

DK-700 (Parr)

Mr. Ray Gigear  
DM&E Corporation  
P.O. Box 178  
Brookings, SD 57006

Subject: Memorandum of Agreement

Dear Mr. Gigear:

Attached for your records is an executed original copy of the MOA between the Bureau of Reclamation and Dakota, Minnesota & Eastern Railroad Corporation. Please contact Jeffrey Nettleton, Rapid City Office, at 605-394-9757 extension 3015, if you have any questions.

Sincerely,



for  
Dennis E. Breitzman  
Area Manager

Enclosure

cc: (w/encl)

Mr. Jack Palma  
Holland & Gart  
2515 Warren Avenue - Suite 450  
Cheyenne, WY 82001

Mr. John Chaffin  
Field Solicitor's Office  
316 North 26<sup>th</sup> Street  
Billings, MT 59101

Mr. Jerry Jacobs  
Bureau of Reclamation  
P.O. Box 36900  
Billings, MT 59107

Mr. Jeffrey Nettleton  
Rapid City Field Office  
Bureau of Reclamation  
515 9<sup>th</sup> Street - Room 101  
Rapid City, SD 57701

bc: DK-700R (Reading File)

E-3

WBR:KParr:mw:10/10/01:605-394-9757  
10-10-01 DM&E Ltr

**MEMORANDUM OF AGREEMENT  
BETWEEN  
DM&E RAILROAD  
AND  
THE UNITED STATES BUREAU OF RECLAMATION**

This Memorandum of Agreement ("MOA") is entered into by and between the Dakota, Minnesota, & Eastern Railroad ("DM&E"), and the United States Bureau of Reclamation (the "Bureau").

**RECITALS**

DM&E has applied for a permit to construct a railroad and all necessary facilities for the functions of the railroad (collectively, the "Railroad") across the Angostura Irrigation District (the "District"), a federally constructed irrigation project, operated by the District.

Among the purposes of this MOA are to provide guidance to the parties for the negotiation and execution of a permanent right-of-way across the Bureau's property or facilities in the District (the "Right-of-Way") including (1) to address the prevention and mitigation of damages to the District's existing facilities during the construction and operation of the railroad, and (2) to address the economic compensation necessary to mitigate the impacts to the financial viability of the District. This MOA does not address rights-of-way across private lands located within the District.

43 CFR Part 429 (the "Code"), as amended, provides authority to the Bureau to grant a right-of-way in connection with the construction, operation and maintenance of any project, provided that the use of the right-of-way is not incompatible with the purposes for which the land or interests in the lands are being administered, and shall be on the terms and conditions which will adequately protect the interests of the United States and the project for which the lands or interests are being administered.

The Bureau may grant a right-of-way to DM&E pursuant to the Code contingent upon the execution of a definitive easement which includes, among other things, conditions requiring DM&E to construct the Railroad subject to the terms of this Agreement, to accept responsibility for damages to the Bureau's and District's facilities which arise as a result of construction or the Railroad's ongoing and future operations; and to pay fees which the Bureau would otherwise receive from the lands being removed from irrigation, or otherwise impacted by the project (the "Easement").



NOW, THEREFORE, DM&E and the Bureau agree as follows:

1. **Operational Impacts.** DM&E and the Bureau will work together in good faith to develop design and operational commitments which will ensure that the construction and ongoing operation of the Railroad through the District will be conducted in a manner that will allow the District to operate and maintain the irrigation system with an efficiency equal to or greater than their current operations. If construction of the railroad results in operational losses in efficiency, DM&E will compensate the District to nullify those effects. The Easement issued to DM&E by the Bureau for rail construction in the District shall be conditioned upon the achievement of those objectives. The parties understand that the Railroad will remove certain lands from irrigation, but shall work to develop conditions which ensure that the overall irrigation system will not be compromised.

2. **Financial Impacts.** DM&E shall be responsible for and assume payment obligations for any lands within the District which must be removed from irrigation as a direct result of the DM&E railroad construction project, including any uneconomic remnants outside of the right of way that cannot reasonably be irrigated. For such acreage, it is the parties' intention that DM&E's obligation in this respect shall be calculated to compensate for the actual payments for use of water that reasonably would have been paid to the District but for the construction and operation of the Railroad, taking into account the conditions and circumstances in place at the time of the assessment. The intention of the parties is that DM&E's financial obligations in this respect will be the same as other landowners in the District, and to the extent possible would mirror the obligations of landowners on that acreage had the Railroad not been built. The parties intend that this financial commitment by DM&E should "make whole" the District financially by paying assessments that would otherwise have been paid on the land directly impacted by the Railroad had DM&E not built the Railroad. In essence, DM&E is to be treated like other landowners for purposes of assessing fees. It is understood that DM&E desires to seek mutually beneficial ways to work with other landowners in the District to consolidate parcels of land on either side of the right of way, and to facilitate the irrigation of certain lands within the District that qualify for but are not being irrigated today, and explore other mutually beneficial arrangements. The Bureau supports that approach so long as it is mutually agreeable to both landowner parties. To the maximum extent allowable by law, the Bureau shall provide flexibility to allow DM&E to use the water on other qualifying land within the District or to transfer its permission to utilize its water allocation to other landowners. The Bureau intends to undertake best efforts to facilitate this process, which is expected to provide new landowner opportunities and minimize the expense of DM&E's "make whole" commitment to the financial condition of the District. The parties do not intend for DM&E to be financially responsible for any indirect impact which may result from the actions of others. The Easement issued to DM&E by the Bureau for the purposes of rail construction in the District shall be conditioned upon the achievement of these objectives.

3. **Structural Impacts.** DM&E shall insure that the design, construction and operation of the Railroad will not result in the deterioration of any federal structures located within the District (such as canals, laterals etc). DM&E shall replace or repair any facility or structure harmed as a result of the construction or operation of the railroad so that it is in at least as good or better condition than would have been the case but for the railroad. DM&E will also provide for structural protection in the event of future financial failure by DM&E in the form of insurance or bonding or other similar instruments which will provide a financial commitment of at least \$5 million to cover any structural failures on the Bureau's and District's facilities. The Easement issued to DM&E by the Bureau for the purposes of rail construction in the District shall be conditioned upon the achievement of these objectives. In addition, to further ensure achievement of these objectives, DM&E will provide the Bureau with an opportunity to consult with regard to the Ongoing Design, through the following steps:

a. DM&E will meet with the Bureau's Designated Representatives (as defined below) throughout the design and construction of the Railroad;

b. DM&E will provide the Designated Representatives with an updated design relevant to the District in advance of the meeting;

c. DM&E will brief the Designated Representatives as to the design of the Railroad as relevant to the District;

d. DM&E will provide the Designated Representatives with the opportunity to respond to the design, and will take into consideration any comments the Designated Representatives may have.

e. Nothing herein shall be interpreted to allow unreasonable delay to the ongoing design process pending a meeting or receipt of the Designated Representatives' comments. Both DM&E and the Designated Representatives shall undertake good faith efforts to accommodate efficient and prompt consultation and comments.

4. **Review and Consultation of the Final Engineering Design.** DM&E will provide the Bureau with an opportunity for review and consultation of the Final Engineering Design, through the following steps:

a. After the design consultations, but prior to the start of actual construction, DM&E will submit the Final Engineering Design to the Bureau for review and comments. The Easement will provide a procedure governing the Bureau's review process, including identifying involved Bureau personnel.

b. The Bureau may reject the Final Engineering Design, within sixty (60) days of receipt of same, if it demonstrates that the Final Engineering Design does not satisfy DM&E's obligations under this Agreement as contemplated for the Easement. The Bureau may request additional time for review upon a demonstration that the need for the additional review time is greater than the need to commence and complete construction.

c. Rejection of the Final Engineering Design must be based on reasonable and generally accepted engineering principles that shall be specified in a written report, detailing the reasons for rejection of the Final Engineering Design.

d. Nothing in the foregoing section, including the failure of the Bureau to provide comments or review the design, relieves DM&E of its obligations to design the Railroad so as not to adversely impact the operations of the District as described herein, and in the Easement.

e. The Bureau will designate specific Bureau representatives (the "Designated Representatives") who will review the ongoing design and Final Engineering Design

d. DM&E shall provide sufficient funds to the Bureau for consultation activities and review of final engineering design(s) which are reasonable and necessary to the issuance of the easement, as provided for in a standard, detailed expense reimbursement agreement between the parties, which shall be entered into as soon as practicable upon the execution of this agreement.

#### 5. Miscellaneous Provisions.

a. The United States Government's tort liability shall be governed by the provisions of the Federal Tort Claims Act (28 U.S.C. § 2671-80).

b. Nothing in this MOA shall be construed as obligating the United States for the present or future payment of money in excess of appropriations authorized by law and administratively allocated for work undertaken pursuant or supplemental to this MOA.

c. The implementing actions of this MOA must comply with the provisions of the Administrative Procedures Act and federal procurement regulations.

d. The Bureau shall, barring unforeseen circumstances, timely issue an easement permit to DM&E within 60 days or less of the Surface Transportation Board's record of Decision Order issued relative to the DM&E project (i.e., STB Finance Docket No. 33407), and issuance thereof shall not be unreasonably withheld subject to inclusion of the above conditions.

IN WITNESS WHEREOF, the parties have executed this Memorandum of Agreement on this 10<sup>th</sup> day of October, 2001.


UNITED STATES BUREAU OF  
RECLAMATION

By: \_\_\_\_\_

  
Dennis E. Breitzman  
Area Manager

DAKOTA, MINNESOTA  
& EASTERN RAILROAD

By: \_\_\_\_\_

  
Kevin V. Schieffer  
President & CEO

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